IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN C. LIEBMAN, ET AL.,	:	
Plaintiffs	:	**CIVIL ACTION**
	:	**NO. 02-2566**
v.	:	
	:	
PRUDENTIAL FINANCIAL, INC.,	:	
Defendant	:	
	:	

MEMORANDUM

RUFE, J. **December 30, 2002**

Before the Court is Defendant's Motion to Dismiss for failure to state a claim. For the reasons set forth below, Defendant's Motion will be granted in part and denied in part.

I. STANDARD OF REVIEW

A court should not dismiss a complaint under Rule 12(b)(6) for failure to state a claim for relief "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In evaluating whether dismissal is proper, a court must accept all the factual allegations of the complaint as true, and must draw all reasonable inferences to aid the pleader. See Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 559 (3d Cir. 2002).

II. FACTUAL BACKGROUND

The following facts are taken from Plaintiffs' Complaint. Plaintiffs in this case are Susan C. Liebman, Donald A. Berg, and Richard L. Gerson, trustees under a Deed of Trust of Samuel A. Liebman (the "Trust"). The Trust was the owner of "Pruco Discovery Life Plus" contracts issued by Pruco Life Insurance Company ("Pruco"). Harold C. Wright, also a Plaintiff in this

case, was also an owner of Pruco contracts. All Plaintiffs are citizens of Pennsylvania. Defendant is Prudential Financial, Inc., a New Jersey corporation with its principal place of business in New Jersey.[1] Prior to becoming a stock corporation, it was known as Prudential Insurance Company of America, a mutual life insurance company organized under the laws of New Jersey (hereinafter referred to interchangeably as "Prudential"). Pruco is a wholly owned subsidiary of Prudential.

In February 1998, Prudential publicly announced its proposal to convert from a mutual life insurance company, which is owned by its policyholders, to a publicly traded stock company owned by its shareholders. This process is referred to as "demutualization." In connection with this announcement, Prudential set up a toll-free telephone hotline for policyholders with questions about the proposed demutualization. Prudential also set up an information center on its web site.

After learning of the proposed demutualization, a representative of the Trust called the toll-free hotline and spoke to a Prudential representative to determine whether policies issued by Pruco (the "Pruco Policies") were eligible for the announced distribution of stock, cash, or increased policy benefits under the demutualization plan. The Prudential hotline representative allegedly "misrepresented that the Trust was not eligible for any distribution because Pruco, the issuer, was already a stock company and not a mutual company." Complaint ¶ 10. In addition, the Prudential hotline representative allegedly "failed to disclose that definitive information concerning the eligibility of Pruco Policies would not be available until Prudential's demutualization plan was publicly announced." Id. Plaintiff Wright made the same inquiry, and

[1] Jurisdiction is premised on diversity of citizenship. See 28 U.S.C. § 1332.

received the same information from the hotline. The Trust attempted to confirm the status of their Pruco Policies under the demutualization plan in two subsequent calls to the hotline, and was told again that the Pruco Policies were not eligible for the demutualization compensation. The Trust was allegedly "further informed that, in the event the trustees were considering surrendering the Trust's Pruco Policies, that they should do so because the Trust would not receive any distributions in connection with those policies under the Prudential demutualization plan." Id. at ¶ 11. In reliance on this information, Plaintiff Wright and the Trust surrendered their policies in April and November 2000, respectively.

Unbeknownst to Plaintiffs prior to surrendering their Pruco Policies, definitive public information concerning the eligibility of Pruco Policies under Prudential's demutualization plan was not available until December 15, 2000, when the plan was publicly announced. After approval by the New Jersey Department of Banking and Insurance and its policyholders, Prudential determined that Pruco Policies would be eligible for demutualization compensation in the form of stock, cash, or policy credits. However, only those policy holders owning Pruco Policies on December 15, 2000 would be eligible. As a consequence, Plaintiffs were not eligible, having surrendered their policies prior to the eligibility date.

Plaintiffs filed their Complaint against Prudential on April 29, 2002, alleging claims for equitable estoppel (Count 1), Fraud (Count 2), and Negligent Misrepresentation (Count 3). Defendant moved to dismiss all claims on June 27, 2002. This case was randomly reassigned to this judge's docket on June 28, 2002.

III. CHOICE OF LAW

Before addressing whether Plaintiffs have stated a claim, this Court must determine

whether the laws of Pennsylvania or New Jersey govern the issues in this case. A federal court sitting in diversity must apply the choice of law rules of the forum state. Lejeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir. 1996). Under Pennsylvania choice of law analysis, a court must first look to see whether an actual conflict exists between the laws of the competing jurisdictions. If there is no difference between the laws of the forum state and those of the foreign jurisdiction, the court may bypass the choice of law issue and rely interchangeably on the law of both states, although presumably the law of the forum state applies. Lucker Mfg. v. Home Ins. Co., 23 F.3d 808, 813 (3d Cir. 1994); Nova Telecom, Inc. v. Long Distance Mgmt. Sys., Inc., No. Civ.A.00-2113, 2000 WL 1593994, at *6-7 (E.D. Pa. Oct. 26, 2000) (in absence of conflict, relying on forum state law).

Where competing laws differ, the court must ask whether such differences present a "false conflict." Lejeune, 85 F.3d at 1071. A false conflict exists where "only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's laws." Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 (3d Cir. 1991). In other words, "although two jurisdictions have nominal contacts with the transaction, only one jurisdiction is truly concerned with the result." Kuchinic v. McCrory, 422 Pa. 620, 624 n.4 (1966). In such a situation, the court must apply the law of the state whose interests would be impaired if its law were not applied. Lacey, 932 F.2d at 187.[2]

[2] Third Circuit precedent varies slightly on the meaning of "false conflict." The Lucker court declared a "false conflict" where there was no difference between the competing laws. 23 F.3d at 813; see also Williams v. Stone, 109 F.3d 890, 893 (3d Cir. 1998) ("where the law of the two jurisdictions would produce the same result," false conflict exists). On the other hand, the Lacey court declared that a false conflict exists where "only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's laws." Lacey, 932 F.2d at 187; Lejeune, 85 F.3d at 1071. While the Lucker approach would require a court to engage in

Where there is no "false conflict," *i.e.*, an actual conflict exists, the court determines "which state has the greater interest in the application of its law." Lejeune, 85 F.3d at 1071. This test involves a combined "relationship" and "interest" analysis. Compagnie des Bauxites v. Argonaut-Midwest Ins., 880 F.2d 685, 689 (3d Cir. 1991). Here, the court must analyze each competing jurisdictions' contacts as they relate to the "policies and interest underlying the particular issue before the court." Cippolla v. Shaposka, 439 Pa. 563, 566, 267 A.2d 854, 856 (1970) (quoting Griffith v. United Air Lines, Inc., 416 Pa. 1, 21, 203 A.2d 796 (1964)). The court must conduct this analysis for each particular issue presented, such that different law may apply to different issues. CAT Internet Servs., Inc. v. Magazines.com, No. 00-2135, 2001 U.S. Dist. LEXIS 8, at *7 (E.D. Pa. Jan. 4, 2001).

As to Count I, the parties have raised the issue of whether the laws of New Jersey or Pennsylvania apply. The Defendant urges this Court to dismiss Plaintiffs' equitable estoppel claim because Pennsylvania does not recognize it as a cause of action. Plaintiffs contend that Pennsylvania does recognize equitable estoppel as a cause of action, but argue in the alternative that their claim may proceed under New Jersey law. In determining which law applies, the Court

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a choice of law analysis if there is any difference in the competing laws, the Lacey approach allows a court to end its analysis before considering the relevant contacts as described in the Restatement section 188(2). See, e.g., Deere & Co. v. Reinhold, No. 99-CV-6313, 2000 WL 486607, at *5-6 (E.D. Pa. Apr. 24, 2000) (finding false conflict where Michigan's interests not impaired by application of Pennsylvania law); Kirby v. Lee, No. Civ.A.98-6483, 1999 WL 562750, at *1-3 (E.D. Pa. July 22, 1999) (finding false conflict where Maryland's interest would be impaired by application of Pennsylvania law, but not vice versa). At least one court has opined that the Lucker approach stems from an incorrect use of the term "false conflict," and that the Lacey court presented the correct analysis. See Naviant Marketing Solutions, Inc. v. Larry Tucker, Inc., No. Civ.A.00-6036, 2002 WL 15918, at *3 n.14 (E.D. Pa. Jan. 4, 2002). This Court agrees with the Naviant court, and will follow the Lacey court's conception of a false conflict: confronted with relevant differences between competing laws, a court may apply the law of one jurisdiction if the governmental interests of the other would not be affected. See id.

must ask whether an actual conflict exists between the laws of the competing jurisdictions.

Pennsylvania recognizes equitable estoppel as an affirmative defense, but not as an independent cause of action. See, e.g., Carlson v. Arnot-Ogden Mem. Hosp., 918 F.2d 411, 416 (3d Cir. 1990) (under Pennsylvania law, "[e]quitable estoppel is not a separate cause of action."); Graham v. Pennsylvania State Police, 643 A.2d 849, 852 (Pa. Commw. Ct. 1993) ("[E]quitable estoppel . . . has only been recognized as a defense and not as a cause of action in itself."); Wolcott v. Allstate Ins. Co., 33 Pa. D. & C.4th 341, 344 (Pa. Com. Pl. 1996) (noting "a promissory estoppel, unlike equitable estoppel, is an independent cause of action."); Weiland v. DeFrancisis, 28 Pa. D. & C.4th 129, 133 (Pa. Com. Pl. 1996) ("[E]quitable estoppel is not an independent cause of action.").

Plaintiffs cite Kreutzer v. Monterey County Herald Co., 747 A.2d 358 (Pa. 2000) as authority in support of its argument to the contrary. However, Kreutzer is not directed to this issue, addressing instead whether "estoppel of any kind," *i.e.*, promissory or equitable, is applicable in a case involving a written contract. See id. at 361-62. This Court will not predict that Pennsylvania would recognize a claim for equitable estoppel without a more definite statement to that effect, or without case law contradicting the precedent cited above. The Court is also mindful that even after Kreutzer, at least one court has continued to eschew causes of action under Pennsylvania law based on a theory of equitable estoppel. See Walsh v. Alarm Sec. Group, No. Civ.A.01-287, 2002 WL 31388824, at *6 (E.D. Pa. Oct. 22, 2002) ("Equitable estoppel, however, is not a separate cause of action; it may be raised either as an affirmative defense or as grounds to prevent the defendant from raising a particular defense.") (citing Carlson, 918 F.2d at 416); see also DVI Fin. Servs., Inc. v. Kagan, No. 00-CV-1666, 2001 WL

706365, at *3 (E.D. Pa. June 21, 2001) (quoting Carlson, 918 F.2d at 416 for same proposition). Accordingly, the Court must conclude that equitable estoppel is not available as a separate cause of action under Pennsylvania law.

By contrast, New Jersey recognizes equitable estoppel as a cause of action. See, e.g., Miller v. Miller, 478 A.2d 351 (N.J. 1984) (holding permanent child support obligation may be imposed on a stepparent on the basis of equitable estoppel); Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 403 A.2d 880, 882 (N.J. 1979) (holding equitable estoppel precludes defendants from denying plaintiff's pension claims). Accordingly, there is a conflict between the laws of Pennsylvania and New Jersey. See, e.g., CAT Internet Servs., 2001 U.S. Dist. LEXIS 8, at *3 (finding conflict where Pennsylvania recognizes claim of interference with prospective contractual relations and Tennessee does not); Nova Telecom, 2000 WL 1593994, at *8 (finding conflict where Pennsylvania recognizes cause of action for civil conspiracy and New York does not).

Having found a conflict between Pennsylvania and New Jersey law, the Court must next consider whether such differences present a "false conflict." Lejeune, 85 F.3d at 1071. It is the opinion of this Court that there is not a false conflict because both Pennsylvania's and New Jersey's interest would be impaired by the application of the other's law. New Jersey's interests would be impaired were this Court to preclude a right that its courts enforce; conversely, Pennsylvania's interests would be impaired by application of a cause of action expressly rejected by its courts. Accordingly, this is a true conflict, and the Court must determine "which state has the greater interest in the application of its law." Id.

On the present record, the Court cannot conduct this analysis, which requires

consideration of (1) the place the injury occurred, (2) the place where the conduct occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship is centered. See, e.g., Arcila v. Christopher Trucking, 195 F. Supp. 2d 690, 695 (E.D. Pa. 2002). Examining Plaintiffs' Complaint, which contains the only statements this Court may consider on a motion to dismiss, the Court knows that Plaintiffs are Pennsylvania citizens and Defendant is a New Jersey corporation (and formerly a New Jersey mutual life insurance company). However, none of the other contacts are evident from the face of the Complaint, and the Court will not accept as true the unsupported statements in the parties' pleadings for purposes of this analysis.[3] Accordingly, the Court will not decide the choice of law issue at this time.

Without making a choice of law determination on the issue of Plaintiffs' equitable estoppel claim, the Court cannot conclude that Plaintiffs' claim should be dismissed for failure to state a claim. Therefore, Defendant's motion is denied as to Count 1.

Similarly, the Court will deny Defendant's motion as to Count 3, which alleges negligent misrepresentation. The parties' memoranda are silent on the choice of law issue with respect to this claim, but the Court notes at the outset that the laws of Pennsylvania and New Jersey appear to conflict. Pennsylvania, on the one hand, requires for a showing of negligent misrepresentation:

(1) a misrepresentation of a material fact; (2) made under circumstances in which the

[3] In their respective memoranda of law, the parties make passing attempts at arguing the choice of law issue, although they relegate such discussion to footnotes. The Court will not make a choice of law determination based on unsupported arguments as to where the insurance contracts were entered into, or from where Plaintiffs made their phone calls to the hotline, nor without considering more developed legal arguments.

> misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.

Heritage Surveyors & Eng'rs, Inc. v. Nat'l Penn Bank, 801 A.2d 1248, 1252 (Pa. Super. Ct. 2002). Because this cause of action sounds in negligence, Pennsylvania courts also insist on the existence of a duty owed by one party to the other. See id. New Jersey courts, on the other hand, provide that "[a]n incorrect statement, negligently made and justifiably relied upon, may be the basis for recovery of damages for economic loss or injury sustained as a consequence of that reliance." H. Rosenblum, Inc. v. Adler, 461 A.2d 138, 142-43 (N.J. 1983) (describing claim for negligent misrepresentation).

The parties agree that the elements of negligent misrepresentation are very similar to the elements of fraud, but provide no more analysis directed to Plaintiffs' claim. It appears to the Court, however, that the elements of this tort are not identical in Pennsylvania and New Jersey. For example, Pennsylvania requires "an intent to induce another" to act on a misrepresentation while New Jersey apparently does not. Without detailed memoranda of law addressing the legal consequences of any differences between the laws of Pennsylvania and New Jersey on this issue, and without considering the parties' arguments on choice of law, the Court is not prepared to decide which state's law applies, or whether Plaintiffs have failed to state a claim upon which relief may be granted. Accordingly, Defendant's motion is denied as to Count 3.

As to Count 2, Pennsylvania law applies to the issue of fraud. The parties have not identified any significant differences between the law of fraud in New Jersey and Pennsylvania, and this Court does not discern any differences. Other courts have reached the same conclusion. See, e.g., MM Props., Inc. v. Coolawalla Enters., Inc., No. Civ.A.95-7598, 1997 WL 189377, at

*9 (E.D. Pa. Apr. 16, 1997) ("[T]he parties have not demonstrated, nor has this Court been able to locate, any meaningful differences between New Jersey, Pennsylvania and Maryland law on fraud."); Progress Fed. Sav. Bank v. Lenders Ass'n, Inc., No. 94-7425, 1995 U.S. Dist. LEXIS 2716, at *5 (E.D. Pa. Mar. 6, 1995) ("The parties agree that there is no conflict between Pennsylvania and New Jersey with respect to the law relevant to the issues of fraud and misrepresentation; therefore, the court need not choose between them."); Flexi-Van Corp. v. Orzeck, Civ.A.No.88-5015, 1990 WL 119308, at *3 (D.N.J. Aug. 14, 1990) (finding Pennsylvania and New Jersey law concerning fraudulent inducement to be the same). In the absence of any conflict, the Court will apply the law of the forum state of Pennsylvania to the issue of fraud.[4] See, e.g., CAT Internet Servs., 2001 U.S. Dist. LEXIS 8, at *5 (where no conflict exists, court presumes forum state law applies).

IV. DISCUSSION

Under Pennsylvania law, a cause of action for fraudulent misrepresentation contains the following elements:

> (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994). See also Pacitti v. Macy's, 193 F.3d 766, 778 (3d Cir. 1999); SmithKline Beecham Corp. v. Eastern Applicators, Inc., No. Civ.A.99-CV-6552, 2002 WL 1197763, at *8 (E.D. Pa. May 24, 2002) (citing Gibbs).

[4] The parties both cite Pennsylvania law in their memoranda, perhaps implicitly agreeing that the forum state's law applies.

Defendant attacks Plaintiffs' fraud count as inadequate both under Rule 12(b)(6) for failure to state a claim, and as insufficiently pleaded under Rule 9(b). Because the Court agrees with the Defendant that the Complaint fails to meet the requirements for pleading fraud under Rule 9(b), Count 2 will be dismissed without prejudice to the Plaintiffs' right to amend the Complaint.

Federal Rule of Civil Procedure 9(b) requires that in "all averments of fraud or mistake, the circumstances constituting fraud shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Rule 9(b) applies to fraud claims based on state law. Christidis v. First Pennsylvania Mortgage Trust, 717 F.2d 96, 99 (3d Cir. 1983).

Defendant challenges the Complaint as lacking in the requisite particularity. Allegations reciting the date, place or time when the alleged fraud occurred are usually sufficient to satisfy Rule 9(b), but "nothing in the rule requires them." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984). Yet without more, bare allegations of date, time or place may not satisfy the Rule's purpose of safeguarding defendants against spurious charges. See Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 646 (3d Cir. 1989). "A complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should serve to seek redress for a wrong, not to find one." Segal v. Gordon, 467 F.2d 602, 607-08 (2d Cir. 1972).

Plaintiffs contend that they have satisfied the particularity requirement. Essentially, Plaintiffs' claim rests on allegations that they were encouraged to call Prudential's hotline for answers to their questions, they received false information that Plaintiffs reasonably relied upon,

and they suffered injury as a result. These circumstances, they contend, give rise to an inference of fraud. This Court disagrees because the facts and allegations as detailed in the Complaint fail to "inject[] . . . some measure of substantiation into their allegations of fraud." Seville, 742 F.2d at 791. This Court is of the opinion that Rule 9(b) requires more than Plaintiffs present.

As the Third Circuit has noted, "fraud consists in anything *calculated* to deceive . . . . It is any *artifice* by which a person is deceived to his disadvantage." Dusquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 611-12 (3d Cir. 1995) (quoting Smith v. Renaut, 564 A.2d 188, 192 (Pa. Super. Ct. 1989)) (emphasis added). Accepting as true Plaintiffs' allegations, the Court is at a loss to discern any conduct giving rise to an inference that Prudential intended a deception, or that its conduct was part of any scheme to visit misfortune upon Plaintiffs. On its face, the Complaint fails to connect the dots between an allegedly false representation and any ill intent on the part of Prudential. It fails to provide sufficient factual context in which an inference of intentional deception may arise. In short, it is not evident from Plaintiffs' allegations "[j]ust what makes [Prudential's] representations fraudulent." HCB Contractors v. Rouse & Assocs., Inc., No. 91-CV-5350, 1992 WL 176142, at *5 (E.D. Pa. July 13, 1992).

Rule 9(b) requires that "circumstances constituting fraud" must be pleaded with particularity, but the circumstances pleaded here do not appear to constitute fraud at all. Where there is no inference of fraud arising from the representations pleaded, the Complaint fails to meet the requirements of the Rule. See, e.g., Timberline Tractor & Marine, Inc. v. Xenotechnix, Inc., No. Civ.A.98-3629, 1999 WL 248644, at *4 (E.D. Pa. Apr. 27, 1999) (dismissing fraud claim under Rule 9(b) because "the representations lack the inference of fraud."); HCB Contractors, 1992 WL 176142, at *5 ("No fraudulent scheme is exposed in the amended

complaint. No fraudulent motive is identified . . . . No reason for HCB's 'belief' that the Owners were dishonest is given . . . . All that appears is a bald allegation of dishonesty unaccompanied by an specific facts from which even an inference of fraud can be drawn."). "Rule 9(b) will have failed in its purpose if conclusory allegations such as these will permit a plaintiff to set off on a long and expensive discovery process in the hope of uncovering some sort of wrongdoing or of obtaining a substantial settlement." Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 116 (2d Cir. 1982).

Accordingly, Defendant's Motion is granted as to Plaintiffs' fraud claim (Count 2). Plaintiffs are granted leave to file an Amended Complaint in accordance with this Memorandum. An appropriate Order follows.